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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA,

Appellant,

vs.

UNITED ARTISTS CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

MOTION TO AFFIRM.

R. G. KELLY,
Counsel for Appellee.

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UNITED ARTISTS CORPORATION, A CORPORATION.

MOTION TO AFFIRM.

Now comes United Artists Corporation, the appellee, by R. G. Kelly, its counsel, and moves this Court to affirm the judgment and decree from which the appeal in the above entitled cause has been taken, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The facts upon which this motion is based are as follows: This is a suit to enjoin the Tax Commissioner of West Virginia from attempting to collect from the appellee a tax, measured by income received by it from the leasing of motion picture films owned by it and distributed to exhibitors in West Virginia, under Section 2(i) of Article 13, Chap-

ter 11, Code of West Virginia, as amended. Appellee is a Delaware corporation with its principal office and place of business in New York City and is engaged in the business of distributing motion picture films from its place of business to exhibitors in practically every State in the United States, including the State of West Virginia. It has no office or place of business in West Virginia.

The facts more fully appear from the stipulation filed herein and the findings of the Court, in which findings it is stated that: "Always the contracts are made in New York, the films are produced and owned outside the State of West Virginia, and the films are shipped from without the State of West Virginia into the State of West Virginia to the exhibitor and are afterwards again shipped out of the State of West Virginia, and payments by the exhibitor are sent to and received by plaintiff (appellee) without the State." Appellant was permanently enjoined from collecting or attempting to collect the tax from appellee, and the Court held that the State of West Virginia has no power to impose and collect the tax because (1) appellee is not engaged in business in the State of West Virginia, and (2) the acts of appellee constitute interstate commerce. These two findings of the Statutory Court give rise to the questions on which the decision of this cause depends.

Appellee is Not Doing Business in West Virginia.

The "doing business" question raised by appellant is so unsubstantial as not to need further argument. The Supreme Court of Appeals of West Virginia in *Underwood Typewriter Co.* v. *Piggott*, 60 W. Va. 532, 55 S. E. 664, has held that sales in one State by a foreign corporation of another, having no place of business in the State in which they take place, "does not constitute doing business in the State". In *United, etc. Machine Co.* v. *Carney*, 116 W. Va. 224, 179 S. E. 813, it is held that a Maine corporation leas-

ing a machine for use in West Virginia by an agreement made in New Jersey, is not doing business in West Virginia. In *Pennywitt* v. *Blue, State Tax Commissioner,* 73 W. Va. 718, 81 S. E. 399, the Court holds that "the legislature cannot be deemed to have intended to subject brokers engaged exclusively in interstate transactions to the license tax." It is submitted that this is not a Federal question. But there is no divergence in the decisions of the Supreme Court of Appeals of West Virginia and of the Supreme Court of the United States. This Court has decided that comparable activities do not constitute doing business: *Western Oil R. Co.* v. *Lipscomb,* 244 U. S. 346, 61 L. Ed. 1181, 37 Sup. Ct. 623; *United Shoe Machinery Corp.* v. *U. S.,* 258 U. S. 451, 66 L. Ed. 708, 42 Sup. Ct. 363.

Appellee is Engaged in Interstate Commerce.

The "interstate commerce" question raised by appellant is so unsubstantial as not to need further argument. This Court has so found in *Binderup* v. *Pathe,* 263 U. S. 291, 68 L. Ed. 308, 44 Sup. Ct. 96, which case has been followed in many Federal decisions, including *U. S.* v. *Paramount,* 34 F. (2d) 984, which was affirmed by this Court in 282 U. S. 30, 75 L. Ed. 145, 51 Sup. Ct. 42. In a tax case, comparable with but not as strong as the instant case, this Court recently answered this question by denying a writ of certiorari: *Paramount, etc. Co.* v. *Henneford, et als., Tax Com'rs,* 184 Wash. 376, 51 Pac. (2d) 385; certiorari denied April 27, 1936, 298 U. S. 665, 80 L. Ed. 1389. All of the points set out in appellant's "Statement of Points to be Relied Upon" filed in the instant case were urged and disposed of in the State court at the hearing of the case last above cited, and were again urged and discussed in briefs filed with this Court in support of and in resistance to the application for a writ of certiorari in that case.

The Tax is an Invalid Burden Upon Interstate Commerce.

This Court has consistently held that a State tax can not constitutionally be laid upon gross receipts from interstate commerce. On May 16, 1938, in *Adams* v. *Storen*, No. 641, October Term, 1937 (decided May 16, 1938), this Court said: "We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce. Appellant's sales to customers in other States and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent on every dollar received from these sales. * * * We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution."

It is respectfully submitted that the questions on which the decision of this cause depends are clearly foreclosed by prior decisions of this Court, and that there is no question presented in this case open for decision, and that this Court should affirm the judgment rendered herein.

(Signed) R. G. KELLY,
Charleston, West Virginia,
Counsel for United Artists
Corporation, Appellee.